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No. 36 and No. 55

IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS

v.

VICE ADMIRAL HYMAN G. RICKOVER

VICE ADMIRAL HYMAN G. RICKOVER

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR VICE ADMIRAL HYMAN G. RICKOVER

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 177 F. Supp. 601 and appears in the Transcript of Record[1] (R. 36-45).

[1] The record before the Court includes the original record certified to the Court of Appeals. A part of this record has been printed and reference to it is by "(R.—)". Pages 3-46 of the printed record are stamp-numbered at the bottom of each page and pages 47-111 bear printed numbers at their upper outside corners.

Counsel have stipulated that they may refer to unprinted portions of the certified record. Reference to such portions will be by "Ex.—".

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 47-64) is reported at 284 F. 2d 262 but it is not yet reported in U.S. App. D.C.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1960 (R. 65-66) and modified January 17, 1961. The petition for certiorari in No. 36 (No. 649, 1960 Term) was filed on January 14, 1961. On January 17, 1961, this Court extended the time to February 17, 1961 in which to file a conditional cross-petition for a writ of certiorari (R. 66). The conditional cross-petition for a writ of certiorari in No. 55 (No. 739, 1960 Term) was filed on February 17, 1961. On March 20, 1961, this Court granted certiorari in both cases and consolidated them (R. 67). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Case No. 55 involves Article I, Section 8, Clause 8 of the Constitution of the United States; Sections 2, 10, 12, 13, 24 and 26 of the Copyright Law (17 U.S.C. §§ 2, 10, 12, 13, 24, 26); and Section 202.6 of the Rules and Regulations of the Copyright Office of the Library of Congress (37 C.F.R. § 202.6).

Case No. 36 involves Article I, Section 8, Clause 8 of the Constitution of the United States and the First and Fifth Amendments thereto; Section 52 of the Printing Law of 1895 (c. 23, § 52, 28 Stat. 608; 44 U.S.C. § 58); Section 8 of the Copyright Law (44 U.S.C. § 8); and Article 1252 of the Navy General Regulations.

Relevant portions of the constitutional provisions, statutes, and regulations involved are printed in the appendices, pp. 1a-9a, *infra*.

QUESTION PRESENTED IN NO. 55

Whether the writer of a speech prepared for delivery by himself at a public function loses his rights of ownership in the speech by distributing copies of it, at the time of oral delivery, to reporters and to certain other interested persons in the form of a multilithed press release, not copyrighted and bearing no notice of copyright, the heading of which identifies the text as a speech prepared for delivery on the occasion, and at the time and place, specified.

QUESTION PRESENTED IN NO. 36

Whether a Vice Admiral of the United States Navy is entitled to own certain literary material,—speeches, —written and delivered by him otherwise than as a part of, or in the course of, his regular duties and not pursuant to official assignment of any kind.

STATEMENT OF THE CASE IN NO. 36 AND NO. 55

The petitioner in No. 55, a Vice Admiral of the United States Navy and Assistant Director for Naval Reactors, Atomic Energy Commission, made a number of speeches, commencing in 1955, on matters of public interest. (R. 37).

I. The Nature of the Speeches

The speeches (R. 48 and Ex. 15, R. 26, 105-107) were not made pursuant to orders or as a part of the Admiral's official duties (R. 56, Ex. 24, R. 27, 111). Some of the ideas expressed were developed by the speaker in connection with his activities as a Naval

officer (R. 37) but the basic theme of the speeches (Ex. 6-A, R. 32) is that the education system in the United States is in need of thorough survey and overhaul.

II. The Dispute Over Publishing Rights

In late October 1958, shortly after the Admiral delivered the twenty-second of his speeches he was asked by the petitioner in No. 36, a book publisher with offices in the District of Columbia, for copies of certain of the speeches and for permission to publish them in book form (Ex. 1, R. 6, 12, 68). The copies were made available but permission to publish the speeches in whole or in part was denied by the Admiral (R. 6) because they were to be published in a book in the near future (Ex. 2, R. 12, 68). More than three months earlier the Admiral and E. P. Dutton & Co., Inc. of New York had contracted (Ex. 16, R. 6, 27, 108) for the publication of a book based in part on his speeches. E. P. Dutton & Co., Inc. gave written notice to the Washington book publisher, in early November 1958 (Ex. 5, R. 6, 13), that an action would be brought if the Admiral's rights in his speeches were infringed. The Rickover-Dutton book, *Education and Freedom* (Ex. 19, R. 7, 27), was published in January 1959 (Ex. 20, R. 7, 27).

III. The Copyrighting of Some of the Speeches

Of the twenty-two speeches made prior to the approach of the Washington book publisher, none had been copyrighted but on all copies of his next speech, "Education—Our First Line of Defense" (Ex. 9, R. 7, 20, 95), prepared for delivery on December 17, 1958, the Admiral placed a notice of copyright in his name,

"H. G. Rickover", and copyrighted the speech as a published work (Ex. 18, R. 7, 27).

Thereupon the Washington book publisher brought this action to secure an adjudication that would declare in effect that the Admiral "has no property right in his speeches; that they are not subject to copyright; that any one is free to publish them at will without paying him any royalty or other compensation; and that he may not cause any person to be restrained from reproducing them, in whole or in part." (R. 37)

IV. The Preparation of the Speeches

The basic question of the Admiral's right to own and control these writings of his was decided in his favor by the trial court (R. 41) and affirmed unanimously by all three members of the Court of Appeals (R. 56, 62 and 64). The Admiral had personally prepared all of the speeches on "his own time" (R. 7, 8), writing them out in longhand at home or while traveling (R. 8) and a large part of the drafts and some of the final copies were typed by Mrs. Rickover at home (R. 8). While some of the final drafts and a multilith master of each speech were typed by the Admiral's secretary at his office and the speeches were multilithed on Government duplicating machines (R. 8), it was held that title to literary property ought not depend on such minor considerations (R. 41). The trial court and the appellate court agreed that the controlling element was that the writing and delivering of the addresses by the Admiral were not "part of his official duties" (R. 40) and not "called for by his official duties" (R. 56).

However, with respect to the speeches delivered before December 1, 1958, two members of the Court

of Appeals decided that the Admiral had forfeited his rights of ownership (R. 57) in those speeches of which copies were distributed by the Admiral without bearing a notice of copyright. Circuit Judge Washington, dissenting, said in part,

> "It is clear that Admiral Rickover intended to foster (fol. 65) the widest public dissemination of his words—as current news—for the sake of advancing his own views and programs. But I think that it is equally clear that he meant to preserve, and actually did preserve, the exclusive right to publish the speeches in compiled form after their immediate news value had passed away. * * * As 'news' they deserve the widest unfettered contemporaneous dissemination. Where, as here, an author seeks to advance this end by making copies of his speeches available to the press and other interested persons, he is serving the public's interest as well as his own." (R. 63).

While the trial court was sustained as to the Admiral's rights of ownership in his copyrighted speeches, it was reversed as to the early uncopyrighted speeches. The nature and effect of the distribution of copies of such uncopyrighted speeches present the question involved in No. 55.

V. The Distribution of the Speeches

The copies distributed were in the form of multilithed press releases (Ex. 6-B, R. 13, 14) and were individually clearly labeled as "Remarks Prepared" by Admiral Rickover for delivery at a specified function (Ex. 6 B-1, R. 69) or as "Address By" the Admiral (Ex. 6 B-14, R. 81) for delivery at a specified time and place. The prominent heading included the words "News Release" and words such as "Please

Note Date" and "Hold for Release until Delivery of Address Expected About 12:00 Noon (EST) Friday, March 1, 1957" (Ex. 6 B-8, R. 74).

Copies of all of the speeches except two were distributed to the press and to individuals who had requested copies or who the Admiral believed would be interested in the subject. Approximately fifty copies were sent to the sponsoring organization, in the case of some speeches, to be made available to the press and others at the place of delivery. Some copies were sent to the Press Club in Washington for the use of representatives of the press (R. 8).

The Court of Appeals, having decided by a divided vote that the Admiral's rights in some of his speeches had been lost by such distribution of copies, then made provision for consideration by the trial court, on remand, of the question of fair use. The trial court was directed to decide the extent to which the Washington book publisher might publish quotations from the balance of the speeches,—those prior to December 1, 1958, which were not distributed and those after December 1, 1958, which were copyrighted,—in which the Admiral's rights of ownership had been unanimously recognized and upheld.

On October 20, 1960, judgment was entered in the District Court awarding the plaintiff-appellant its taxable costs on the appeal. On January 17, 1961, on consideration of defendant-appellee's motion to recall and modify the judgment an order was entered by the Court of Appeals recalling and modifying the judgment to provide that each party bear its own costs.

This Court by its orders of March 20, 1961, granted certiorari in No. 36 (No. 649, 1960 Term) and No. 55

(No. 739, 1960 Term) and consolidated the cases (R. 67). The date for filing printed briefs was fixed as September 15, 1961 with provision for a prior exchange by the parties of typewritten affirmative briefs.

SUMMARY OF ARGUMENT

The Admiral's rights of ownership in his speeches accrued to him as the speeches were written. Such rights continue until copyright is acquired under an appropriate statute or the owner makes an unlimited distribution of copies of the material under circumstances indicating that the rights must be deemed abandoned or forfeited.

The distribution made of copies of the early speeches bearing no notice of copyright was not such as to terminate the common law rights of ownership. The law looks with disfavor on the forfeiture of the author's rights of ownership and favors the author in doubtful cases.

The term "publication" has two meanings in copyright law. The first refers to that publication which is necessary to secure copyright in a published work under the statute and this, properly called investitive publication, involves minimal distribution. The second type of publication, divestitive publication, is that distribution of copies not bearing a notice of copyright which will be deemed, under the attendant circumstances, to constitute an abandonment of rights.

The number and nature of the copies distributed and their manner of distribution in this case was not such as to spell out a forfeiture. The material was not a book, it was a speech clearly marked as such for oral delivery at a time and place stated. The persons to whom distribution was made were reporters and in-

terested persons and not the general public within the meaning of the cases dealing with unlimited publication. The number of copies distributed was less than some distributions which have been held not to be dedications.

The oral delivery of the addresses did not constitute a general publication and to add the element of "performance" to a description of the number and manner of distribution of copies is not sound. Under all the circumstances of the case the holding by the majority of the Court of Appeals that there was a general, unlimited publication which dedicated the material to the public domain should be reversed.

Individual Versus Government Ownership of the Admiral's Speeches

Since the Admiral did not make the speeches as part of his official duties or pursuant to orders, the material he wrote and delivered orally belonged to him personally and not to his employer, the government. That the Admiral's interest in the subject of education was aroused by his experience in the Navy does not make his speeches the property of the United States. That his speeches, aiming to improve educational methods, were in the best interests of the United States, and incidentally of the United States Navy, did not deprive him of his rights in the material.

The use of some government personnel and equipment in the making of copies of the speeches for distribution is a minor consideration not affecting the substantive right of private ownership in the literary material itself. The preparation of some multilithed copies of the speeches was necessary as a practical

matter to comply with the requirement of the Defense Department Directive that writings for publication by Defense personnel as individuals be submitted to the Office of Security Review for clearance and to comply also with the requirements of the Navy Department Regulations that copies of such material be supplied to the Secretary of the Navy for the files of the Department.

If it were determined that speeches such as these belong to the government rather than to the author on completion, they would go into the public domain if, as and when they were published by the government. In that event they would belong to no one because of the provision in the Copyright Act (17 U.S.C. § 8) that no copyright shall subsist in "any publication of the United States Government." Such a determination would be inequitable and serve no useful purpose. Any publisher would then be able to market the speeches without securing the writer's permission and without incorporating any changes or additions desired by the writer for their publication in book form as distinguished from their individual oral delivery.

The Government has asserted no claim in these speeches although invited to do so. On the contrary it has taken the position that the speeches were made in a private, rather than a governmental, capacity.

The Admiral's speeches added to the sum of human knowledge and his initiative in assembling his thoughts and making them public should be encouraged and rewarded. There was no bottling up of news and no question of freedom of the press is presented. Each speech expressly invited contemporaneous press use of the material, or, more specifically newspaper or news periodical use. Even if it had not done so, the press

could have used part or all of the material according to its judgment of what was newsworthy.

Copyright protects the form in which ideas are expressed but the ideas themselves may be freely used and circulated by anyone. The "news" element, the information concerning current developments, contained in a literary production, is not the subject of copyright. Any newspaper, news service or news periodical would be completely justified in quoting extensively and even in full from a speech of a government official in order to inform its readers with respect to his views and his activities and this would be so whether the statements were his own private statements, copyrighted or uncopyrighted, or official statements made by him for and on behalf of the government.

Under the doctrine of "fair use" any writer may make reasonable quotation from a protected work whether it be protected under common law principles or pursuant to copyright obtained under a statute.

There is no conflict between the Copyright Law and the freedom of speech and of the press guaranteed in the First Amendment. These guarantees do not mean that strangers to the act of creation may take and use without permission material belonging to its author.

The unanimous findings of fact should not be disturbed. The conclusion of law reached by the trial court and the Court of Appeals that these speeches belonged to the Admiral rather than the Government should be affirmed. As stated above, the conclusion of law reached by two of the members of the Court of Appeals that the distribution of the early uncopyrighted speeches dedicated the materials to the public domain should be reversed.

THE ARGUMENT

I. THE ADMIRAL'S RIGHTS OF OWNERSHIP IN HIS SPEECHES ACCRUED TO HIM AS THE SPEECHES WERE WRITTEN AND ENDURE UNTIL (a) COPYRIGHT IS OBTAINED UNDER THE FEDERAL STATUTE OR (b) THE WORK IS PUBLISHED WITHOUT COMPLYING WITH THE STATUTE.

The author's rights of ownership in his writings are recognized on principles of natural justice. Drone, in *The Law of Property in Intellectual Production* (1879) says at page 5:

> "Ownership, then, is created by production, and the producer becomes the owner. This principle is general, and covers all productions,—the whole field of labor. It cannot be applied to the produce of one kind of labor, and withheld from that of another. It matters not whether the labor be of the body or of the mind. * * * "

However, at an early date it was established that the rights of an author do not include the right to "publish" copies of his work, that a "publication" of the work terminates the author's pre-existing rights and that his rights in the work thereafter are those acquired by him under an appropriate statute. *Wheaton* v. *Peters*, 8 Peters 591; *Donaldson* v. *Becket*, 4 Burr. 2408.

In the United States the Constitutional foundation for the federal copyright statute is Article I, Section 8,—

> "The Congress shall have power * * *; (Clause 8)
>
> * * *
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The first Copyright Act, the Act of 1790, granted to the author of any "map, chart, book or books" printed in the United States the sole right to publish and sell copies of the work for fourteen years upon complying with certain formalities and also provided for the preservation of the common law right of authors in their unpublished works. (Sec. 1 and Sec. 6 of the Act of May 31, 1790, c. 15, 1 Stat. 124).

The same situation prevails today. Section 2 of the Copyright Act (17 U.S.C.) reads:

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

Wheaton v. *Peters* (*supra*) was the first copyright case to come before the Supreme Court. It held that the rights granted by the statute, the Act of 1790, were new rights. With respect to common law rights it said,

> "As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery. * * * " (8 Peters at 661).

With respect to the right of making and publishing copies it said,

> "This right, as has been shown, does not exist at common law—it originated, if at all, under the acts of Congress. No one can deny that when the Legislature are about to vest an exclusive right in an author or an inventor, they have the power

> to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law." (8 Peters at 663-4).

Mazer v. *Stein*, 347 U.S. 201, most recently enunciated the same principle, 347 U.S. at 214-15.

The question presented in this case is: What constitutes substantial compliance with the "requisitions of the law" and, specifically, whether the Admiral's early uncopyrighted speeches were "published" or "unpublished" in the light of the concepts of "publication" which have been developed in judicial interpretations of the federal copyright statute.

II. THE DISTRIBUTION BY THE ADMIRAL OF PRESS RELEASES OF HIS SPEECHES WITHOUT NOTICE OF COPYRIGHT DID NOT CONSTITUTE A PUBLICATION OF THE SPEECHES OF SUCH WIDE AND GENERAL NATURE AS TO TERMINATE HIS COMMON LAW RIGHTS OF OWNERSHIP IN THEM.

A. There are two types of publication: investitive and divestitive.

The correct answer to this question requires a full appreciation of two vastly different, co-existing meanings that the word "publication" has acquired in the field of copyright.

The first meaning is that associated with the statement: Copyright may be acquired by publication with notice of copyright. The second meaning is that implicit in the statement: Publication of a work, without notice of copyright, terminates the common law rights.

These two meanings of the word publication, radically different, are appropriately classified as Investi-

tive Publication and Divestitive Publication. Brown and Kaplan, *Cases on Copyright* (1960), 52-64, DeWolf, *An Outline of Copyright Law* (1925), 32.

B. Investitive publication is merely a formal compliance with the Copyright Act.

Investitive publication, that which will constitute a compliance with Section 10 of the Copyright Act in securing copyright in a published work, is minimal. The unrestricted sale of a single copy of a song, without any effort to push the work commercially, is enough, *Stern* v. *Jerome H. Remick & Co.*, 175 Fed. 282 (C.C. N.Y.). Deposit of copies of a motion picture film with the Librarian of Congress was held sufficient in *Cardinal Film Corp.* v. *Beck*, 248 Fed. 368 (D.C.N.Y.). The sale of one of three galley proofs of an open letter from Al Smith having great news value was held sufficient even though the sale was to an officer of the applicant for copyright registration and the sale price was only ten cents. *Atlantic Monthly Co.* v. *Post Publishing Company*, 27 F.2d 556 (D. Mass.).

C. Divestitive publication is one so broad and general as to indicate an abandonment of rights.

Divestitive publication, on the other hand, usually called "general publication", is a vastly different matter. Reluctant to decree the destruction of hard-earned rights, and often as a result of balancing the equities of an author against those who seek to use his material freely and free of charge, the courts have developed a concept of that type of publication which will divest an author of his rights as a wide and indiscriminate circulation of copies of the work product. As a corollary, to serve as a counterpart of "general publication", there has grown the practice of referring to a

publication which is less than general and, therefore, not divestitive, as a "limited publication".

The cautious approach of the courts to this question and their endeavor not to reach a determination that any given publication of copies without notice of copyright shall be deemed to have terminated common law rights is in accord with the philosophy of concern for the author which underlies the decision of this Court in *Washingtonian Publishing Co., Inc.* v. *Pearson*, 306 U.S. 30. There it was said, in holding that a copy deposited fourteen months after publication had been "promptly deposited" as required by 17 U.S.C. § 13 (then Section 12), "Such forfeitures are never to be inferred from doubtful language." 306 U.S. at 42.

There is no definition of "publication" in the Copyright Act to serve as a guide. Section 26 of Title 17 U.S.C. defines "the date of publication" but merely to fix the beginning of the term of copyright as "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed * * *". This, as Judge Augustus N. Hand said in *Cardinal Film Corp.* v. *Beck*, 248 Fed. 368, 369, (D.C.N.Y.) "was an enactment to fix the date from which the copyright term should begin to run, and not a general definition of what constituted publication". Cited with approval in *F. B. Patterson* v. *Century Productions, Inc.*, 93 F.2d 489, 492 (2 Cir.).

Section 26 is derived from Section 62 of the Copyright Act of 1909. Prior to 1909 there was no need for such a definition because the term of copyright ran from the time of recording the title in the Clerk's office and depositing copies. The Act of 1909 provided for the securing of copyright in a work as a published

work "by publication thereof with the notice of copyright required by this title", 17 U.S.C. § 10. Deposit and registration became conditions subsequent and the term was fixed as running from the "date of publication". Section 23 of the Copyright Act of 1909, now 17 U.S.C. § 24.

In addition, the Act of 1909 made provision for copyrighting, as unpublished works, certain material including lectures, dramatic and musical works, "of which copies are not reproduced for sale". Section 11, Copyright Act of 1909, now 17 U.S.C. § 12. The commencement of the term of copyright for unpublished compositions is not specified in the statute but in *Shilkret* v. *Musicraft Records,* 131 F.2d 929 (2 Cir.), certiorari denied, 319 U.S. 742, it was held that the words "date of first publication" in 17 U.S.C. § 24 refer to the date of registration of an unpublished work.

The Committee Report (H.R. Rep. No. 2222, 60th Congress, 2d Session) recommending the passage of the Copyright Act of 1909, takes up each section of the bill in numerical order, notes that under Section 9 (now 17 U.S.C. § 10) copyright will be effective "upon the publication with notice" and in discussing Section 23 (now 17 U.S.C. § 24) deals with the new length of term but not with the date of its commencement. With respect to Section 62 (now 17 U.S.C. § 26), defining the words "the date of publication", the report merely states that it "places an interpretation and construction upon the use of certain words".

The language of the majority opinion of the Court of Appeals takes this "definition" of the date of publication in 17 U.S.C. § 26 which it concedes is not directly applicable, states that it "does give some in-

dication of Congressional thinking on the subject" (R. 57) and, in effect, interprets the words "public distribution" to mean "any public distribution" (R. 59).

The majority opinion quotes the statutory definition in the British Act (Copyright Act, 1956, 4 and 6 Eliz. 2, c. 74) (R. 57-58) which states that a work shall be taken to have been published if "reproductions of the work or editions have been issued to the public". It then quotes (R. 58) from Copinger and Skone-James' work (*Copyright*, 9th edition, 1958, 21, 30) which uses practically the same words as the statute, as follows:

> "Prima facie, a literary, dramatic or musical work, or an edition of such work or an artistic work, is published if, but only if, reproductions of the work have been issued to the public * * *"

The majority then concludes, notwithstanding a reference to the need for a liberal attitude in protecting any work in its passage from the so-called "nonproductive" common law rights of an author (R. 58), that the "definition" of publication for commencing the term of copyright should be the "measure for the meaning of publication for release of authorship rights" (R. 59).

This misses the fundamentals of the proper approach to the status of the rights of authors whose works have been distributed quite widely but not so widely that an implied intention to abandon should be found to exist. It is one hundred eighty degrees out of phase with what Judge A. N. Hand said in *Cardinal Film Corp* v. *Beck*, 248 Fed. at 369, that Section 26 was "not a general definition of what constituted publication."

Of the numerous cases dealing with this subject of limited publication, the outstanding assemblage of authorities and reasoning on the subject is that contained in *White* v. *Kimmell*, 94 F. Supp. 502 (S.D. Cal.), in which Judge Yankwich dealt, in an action for a declaratory judgment, with a set of facts involving wide distribution of a portion of a book known as the Gaelic manuscripts. In *White* v. *Kimmell*, on appeal, according to the Circuit Court, at least as many as 200 copies of the work were put in unrestricted circulation over the long period between 1933 and 1946. 193 F.2d 744, 747-8 (9th Cir.). The District Court's opinion placed great weight on *"The nature of the subject-matter, the character of the communication, circulation or exhibition, and the nature of the rights secured"* (94 F. Supp. at 506) in arriving at its decision that there had been but a limited publication which did not operate to dedicate the author's rights to the public domain.

The District Court was reversed by the Court of Appeals which, after reviewing the facts and emphasizing the breadth and nature of the distribution of copies, paid tribute to the District Court's opinion in the following language:

> "The trial judge's opinion contains a comprehensive and concededly accurate survey of the judicial precedents relating to limited publication, and there would seem to be no justification for our duplicating his efforts in that direction." 193 F. 2d at 746.

but proceeded to say that

> "The respect in which we are constrained to disagree with the judge is in the application of the stated legal principles to the facts of the case." 193 F. 2d at 747.

It is essential to note that one of the principal elements of the thinking of the Court of Appeals, in reversing the District Court in *White* v. *Kimmell*, was the fact that the material distributed was a portion of a book and not, on its face, a speech or address. The Court of Appeals itself makes the distinction in the following words, 193 F. 2d at 747:

> "Nor is it thought that the case is comparable to those involving publication of lecture notes, or the distribution of copies of a minister's sermon among the members of his congregation, or kindred cases relied on below. It is by such assimilation that the trial court endeavors to satisfy the criterion of the distribution being limited to a specific purpose. But White does not appear in the record as a teacher or as a propagandist endeavoring to persuade. He is not pictured as a man with a message. His only apparent purpose was to enable any persons interested to obtain a copy of the manuscript. No other motive is discernible."

In view of this language of the Circuit Court there is no doubt that if the material distributed in *White* v. *Kimmell* had been speeches, labeled as such, as in this case, the Circuit Court would have agreed with the District Court's decision that there was no dedication. This fundamental distinction was apparently overlooked by the majority of the Court of Appeals in relying on the Circuit Court of Appeals reversal of Judge Yankwich in *White* v. *Kimmell*.

It is not contended that the danger of a divestitive publication is limited to works of which copies are offered for sale merely because there is a commercial connotation to the words "the first authorized edition" in 17 U.S.C. § 26 or because lectures are grouped with other works not reproduced for sale "and the copyright

proprietor is not exempted from the deposit requirement where the work is later reproduced for sale". 17 U.S.C. § 12, 37 C.F.R. 202.6. However, it is urged that the non-commercial nature of this distribution of copies should be given weight.

If the purpose of producing these copies of speeches in advance had been to sell them, the overall nature and effect of the distribution would have been substantially different. These copies were merely made available for the aid of the press representatives covering the speeches in order to facilitate accurate quotation and also for the information of the speaker's friends and those he knew to be interested in the subject to spread the word of his personal crusade for improvement in educational methods.

D. The copies distributed were not books or parts of books: they were clearly marked as speeches prepared for oral delivery.

The nature of what was distributed by the Admiral is especially significant. These copies were clearly marked as addresses prepared for oral delivery. They were not, and did not resemble, books. The primary usage of books is through the multiplication and sale of copies; the primary usage of speeches is through their oral delivery.

In view of these circumstances the distribution of these press releases ought not be deemed to be a general or divestitive publication. The number of copies distributed, within reasonable limits, ought not be a criterion. It is "the nature of the subject matter, the character of the communication, circulation or exhibition and the nature of the rights secured" which are chiefly determinative of the question of publication. *Werckmeister* v. *American Lithographic Co.*, 134 Fed.

321 (S.D.N.Y.) The number of copies of each speech distributed is not specified in this record other than as summarized in Paragraph 3 of the Statement of Facts (R. 8). However, it is not conceded that the total number was nearly as large as the number of copies distributed in *White* v. *Kimmell* (*supra*). It is believed that the opinion of the majority of the Court of Appeals (R. 60), in separately enumerating "distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches", provides undue exaggeration of the number of copies which were distributed.

A wide distribution of a translation of copyrighted work in mimeographed copies to theatrical producers to induce them to produce the work was held to be not a dedication in *Ilyin* v. *Avon Publications, Inc.*, 144 F. Supp. 368 (S.D.N.Y.) even though no notice of copyright was on the copies. In the District of Columbia circuit, the case of *Hirshon* v. *United Artists Corporation*, 100 U.S. App. D.C. 217, 243 F.2d 640, decided that the distribution to broadcasting stations and professional musicians for plugging purposes of some 2,000 printed copies of a song did not operate to dedicate the rights to the public domain even though the copyright notice was unauthorized.

In *Continental Casualty Co.* v. *Beardsley*, 151 F. Supp. 28, affirmed, 253 F.2d 702 (2 Cir.), it was held that the distribution of 100 printed copies of a pamphlet bearing no notice of copyright was a general publication. The publication was distributed gratis for the purpose of securing business.

The distribution to students of papers describing a system of bookkeeping was not such a publication as

operated to divest the lecturer of his rights. *Bartlett* v. *Crittenden*, 2 Fed. Cas. 967, No. 1076 at 970 (C.C.D. Ohio). To the same effect, see *M'Dearmott Commission Co.* v. *Board of Trade*, 146 Fed. 961 (C.C. Mo).

E. The delivery of a speech does not publish it.

Nutt v. *National Institute Incorporated for the Improvement of Memory, Inc.*, 31 F.2d 236 (2 Cir.), held that the delivery of lectures did not constitute a publication of the lectures and said that "Even where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they have not obtained the right to sell". 31 F.2d at 238.

The performance of an uncopyrighted drama upon the stage does not constitute a publication, *Ferris* v. *Frohman*, 223 U.S. 424, and the same rule is applied to broadcast programs. *Uproar Co.* v. *National Broadcasting Co.*, 8 F. Supp. 358 (D. C. Mass.), affirmed, 81 F.2d 373 (1 Cir.). Related cases on the subject are collected in Nimmer, *Copyright Publication*, 56 Columbia Law Review 185. The law with respect to the non-dedicatory effect of a performance is so well established that it is difficult to understand why the oral delivery of the speeches should be included with the fact of distribution of copies by the majority of the Court of Appeals in arriving at the conclusion that "these acts, in their totality, constitute publication" (R. 60).

Judge Learned Hand in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 191 F.2d 594 (2 Cir.), summarized his views on the loss of rights in copyrighted material in ruling on the effect of distributing mats of comic strips to newspapers

without proper copyright notice. Copyright in some of the strips was held to have been abandoned but the Court adopted a liberal view with respect to defective and occasionally omitted notices and notices omitted through no fault of the copyright owner. The surrounding circumstances played some part in the Court's thinking for it said (191 F.2d at 603), "We are unwilling to allow a bare-faced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public."

With respect to abandonment and forfeiture, Judge Hand said "We do not doubt that the 'author or proprietor of any work made the subject of copyright' by the Copyright Law (footnote omitted) may 'abandon' his literary property in the 'work' before he has published it, or his copyright in it after he has done so; but he must 'abandon' it by some overt act which manifests his purpose to surrender his rights in the 'work', and to allow the public to copy it." (191 F.2d at 598). Judge Hand then distinguishes the terms "dedication", "abandonment" and "forfeiture", pointing out that the first two presuppose an intentional surrender whereas "forfeiture" does not.

Rights of ownership may be forfeited but not under the circumstances of this case.

In this case the nature of the material distributed and its manner of distribution militate against a finding of abandonment or forfeiture and, as Circuit Judge Washington said in his dissent, the Washington book publisher "comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the (fol. 67) speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. * * * " (R. 64).

III. THE ADMIRAL—NOT THE UNITED STATES GOVERNMENT—ACQUIRED THE RIGHTS OF OWNERSHIP IN THE SPEECHES AS HE WROTE THEM.

The principal question presented in this case is whether the Admiral, putting aside for the moment any question of divestitive publication, is entitled to own and control the literary material written by him under the factual circumstances established in the record. The question was properly decided in his favor by both the trial court and the Court of Appeals.

A. Neither the writing nor the delivery of the speeches was pursuant to orders or a part of, or in the course of, the Admiral's official duties.

The trial court found that the writing and delivering of the speeches were no part of the Admiral's official duties (R. 40). The Court of Appeals unanimously agreed, saying that they were not governmental publications because they were not "called for by" the Admiral's official duties nor were they "explanations as guides for official action" (R. 56, 64).

The trial court recognized that the speeches had "some bearing on" the Admiral's official duties (R. 40) but their drafting and delivery was "no part of" his official duties (R. 40) and since "no one sells or mortgages all the products of his brain to his employer by the mere fact of employment" (R. 40) the speaker's intellectual products are his own and "do not automatically become the property of the Government" (R. 40). In full agreement, the Court of Appeals ruled that, "It cannot be properly said, as appellant asserted, that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions." (R. 56).

1. The Admiral was acting in an individual capacity and not as a representative of the Government in making his speeches and in protecting his rights in them.

The speeches were written to express the Admiral's personal views (Ex. 24, R. 27, 111). Nowhere do they purport to express or explain official attitudes or pronouncements. The first paragraph of Chapter I of Admiral Rickover's book, *Education and Freedom* (Ex. 19, R. 27), published on January 8, 1959 (Ex. 20, R. 27) before this action was commenced (R. 6), establishes his thesis as follows:—

> "This book is a collection of speeches made during the last four years. Some have been shortened, others expanded, and some new material has been added to produce an orderly sequence. There is no Aristotelian unity in it but each chapter touches on some aspect of education and freedom. Each, whether or not it deals with education directly, points up the need of better schooling for all our children—education far superior to anything we in this country have ever had or ever needed in the past. Only massive upgrading of the scholastic standards of our schools will guarantee the future prosperity and freedom of the Republic." (Ex. 19, p. 15)

He made no attempt to hide the obvious fact that his thoughts and conclusions were based on his own experience and observations in the service of his government as well as outside it:—

> "This is a conclusion which I reached as a result of my personal experience with developing a new source of power—nuclear fission. Engaged in research, development, and building of nuclear power plants as the Atomic Energy Commission and the Navy are, we found that this could not be done unless we raised our thinking and our actions to technological levels well above those prevailing

> at the time. * * * In one sense, this book represents my groping for an answer why so many road blocks, technical and nontechnical, delayed building a nuclear navy as fast as I consider essential to the security of the country. In a broader sense, the conclusions I reached apply to delays hindering *all* attempts at technological breakthroughs; they seek to pin point the elements which hinder all new development projects, * * *. (Ex. 19, pp. 15, 16)

The majority opinion of the Court of Appeals concludes that "A perusal, (fol. 58) even of the titles and the places of delivery alone, should be sufficient to show that these addresses were not governmental in that sense." namely, "statements called for by his official duties or explanations as guides for official action" (R. 56).

Long prior to the passage of a statute on the subject the question of private versus government ownership of literary property arose in connection with the rights asserted by court reporters in their reports of judicial proceedings. It was held that while the opinions themselves could not be copyrighted, the marginal notes or head notes of the cases and points decided, the abstract of the records, evidence and arguments and the index, represented the individual work of the reporter in which he was entitled to copyright protection. *Callaghan* v. *Myers,* 128 U.S. 617; *Wheaton* v. *Peters,* 8 Peters 591.

Another early case, decided by a federal circuit court in the absence of statute, was *Heine* v. *Appleton,* 11 Fed. Cas. 1031, No. 6, 324 (C.C.N.Y. 1857). This involved an attempt by an artist to assert a private right of copyright in drawings which he had prepared

as a member of Commodore Perry's expedition to Japan. The drawings were incorporated in the Commodore's report to the Secretary of the Navy, ordered printed by Congress and distributed. The artist later effected registration of copyright in the drawings in his name and then brought suit to enjoin another from reproducing them. The court held that he was neither the author nor the proprietor of the drawings because they belonged to the government pursuant to the understanding of his duties on the basis of which he joined the expedition. The court said "The sketches and drawings were made for the government, to be at their disposal; and Congress, by ordering the report, which contained those sketches and drawings, to be published for the benefit of the public at large, has thereby given them to the public." 11 Fed. Cas. at 1033.

The term "Government publication" is used in 44 U.S.C. § 58 (c. 23, 28 Stat. 601, § 52) and the term "publication of the United States Government" is used in 17 U.S.C. § 8. The first, originating in Section 52 of the Printing Law of 1895, directs the Public Printer, the manager of the Government Printing Office, to sell under Congressional regulation, "additional or duplicate stereotype or electrotype plates from which any Government publication is printed" and provides that "No publication reprinted from such stereotype or electrotype plates and no other government publication shall be copyrighted." The second, 17 U.S.C. § 8, (originally Section 7 of the Copyright Act of 1909, c. 320, 35 Stat. 1075) provides that "No copyright shall subsist in * * * any publication of the United States Government, or any reprint, in whole or in part, thereof: * * *" The terms are not defined in either statute.

Since the enactment of the Printing Law of 1895 and the Copyright Act of 1909, the judicial approach to the question of individual versus government ownership of literary material has not fundamentally changed. In recent years, while legal precedent in the precise area is not abundant, a number of books have been written by officers of the military services, some of which are listed in Exhibit 21 (R. 27, 109-111). Each of them was printed by a private publishing house and copyrighted and their status apparently has not been formally questioned. However, there are three cases which were decided since the Copyright Act of 1909 introduced in its Section 7 the prohibition of the present 17 U.S.C. § 8 against the copyrighting of Government publications. They serve to establish not only those circumstances under which a government official's writings are his own but also those under which the created product is that of the Government.

The first of these is *Sherrill* v. *Grieves*, 57 Wash. L. Rep. 286, decided in 1929 in the Supreme Court of the District of Columbia. This was a suit to enjoin alleged infringement of copyright in a book entitled *Military Topography for the Mobile Forces, Including Map Reading, Surveying and Sketching* written by the plaintiff, C. O. Sherrill, while a captain in the United States Army and an instructor at its post-graduate school for officers at Fort Leavenworth, Kansas.

The matters dealt with in the book had been for many years subjects of instruction at Fort Leavenworth. The topics are essentially military and highly technical. There was maintained at the school, at government expense, a printing shop and bookbindery known as the "Leavenworth Press".

While Sherrill was instructing at Leavenworth on the subjects of military sketching, map reading and surveying there was no suitable textbook in the field. He prepared material for such a book in his leisure time for general use and not for the Army only. At the request of authorities at Leavenworth, before his book was printed for general circulation, Sherrill permitted the use at the school of a considerable part of what he had written. A number of copies, sufficient to supply the students at the school, of that part of his work dealing with military sketching, were printed in the form of a pamphlet on the Leavenworth Press. The pamphlet, entitled "Military Sketching", bore the copyright notice, "Copyright 1910, by C. O. Sherrill", and Sherill duly filed his application for registration with the Copyright Office. The bottom of the title page bore the imprint, "The Army Service School Press, Fort Leavenworth, Kansas, March, 1910."

Subsequently, in July of the same year, Sherrill incorporated the pamphlet in his book, the subject of the infringement action, as Part III thereof and copyrighted the book under the title *Military Topography for the Mobile Forces, Including Map Reading, Surveying, and Sketching.*

The defendants claimed that Grieves used no part of Sherrill's "Leavenworth Pamphlet" in the books subsequently written by Grieves and published by the defendants but asserted that even if Grieves had done so such use would have been permissible because, they said, the "Leavenworth Pamphlet" was a "publication of the United States Government" and as such not entitled to copyright under 17 U.S.C. § 7 (now 17 U.S.C. § 8).

In this connection the Court, Mr. Chief Justice McCoy, said

> "* * * The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him." (57 Wash. L. Rep. at 290).

The Court then disposed of the contention made by Grieves' publishers that "the public" had already "paid" for Sherrill's material as follows:

> "This contention is in substance that by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with by him in performing his duties. * * * The fact is that officers do write such books which are copyrighted and used in Government schools with the approval of the military establishment, and such books are found in the libraries of those establishments. * * *
>
> * * *
>
> "The Leavenworth pamphlet is not a public document. Nor did the publication of it at Fort Leavenworth put it in the 'public domain' * * *". (57 Wash. L. Rep. at 290-91).

At the other end of the spectrum, emphasizing the circumstances under which an employee of the government does not acquire title to his writings, there is the second case, *Sawyer* v. *Crowell Publishing Company*, 142 F.2d 497 (2 Cir.), affirming 46 F. Supp. 471 (S.D.N.Y.), certiorari denied, 323 U.S. 735.

The plaintiff, Ernest Walker Sawyer, was Executive Assistant to the Secreary of the Interior from March 1929 to March 1933. During 1929 Sawyer was sent to Alaska on official business and on his return he directed an employee named Wills in the Division of Surveys, General Land Office, Department of the Interior, to prepare a map in connection with his work in Alaska to accompany a report to the Secretary of the Interior. The map was then printed by the United States Geological Survey and copyrighted by Sawyer in his own name in 1930. In the preparation of the map Mr. Wills, at Sawyer's direction, used:

> "* * * the materials and facilities of the United States government and books, publication and scientific information on file in the Department of the Interior. He received no pay from Mr. Sawyer for his work on the map. The map was prepared as a result of and relating to Mr. Sawyer's work in Alaska in the course of his official duties. * * *" 142 F. 2d at 497.

The map was republished in 1931 by the United States Geological Survey at the direction and expense of a Congressionally-created Highway Commission to which the plaintiff had been appointed. As republished it included certain additional information, eleven red lines and intercity mileage data, and Sawyer's original 1930 copyright notice. No copyright was sought by Sawyer in the additional matter. In the June 1931 edition of a Department of Interior catalog the map was listed as a "Department of Interior Publication Relating to Alaska" under the title "Great Circle Map showing Fairbanks, the Center of Europe, Asia and America, Map No. 8".

The allegedly infringing map published by the defendant, Crowell Publishing Company, was a copy of portions of "Map No. 8". The Circuit Court observed that the district court had ruled as a matter of law,

> "* * * (1) that Map No. 8 is a publication of the United States Government and no copyright subsists therein; (2) that any rights that may exist in the copyrighted map are the property of the United States and, if the plaintiff has a valid copyright, it is held in trust for the United States; * * * " (142 F. 2d at 498).

The judgment was affirmed by the Second Circuit Court of Appeals, Circuit Judge Swan writing:

> "* * * Mr. Sawyer, it is true, testified that he went to Alaska in 1929 to investigate the reindeer situation and that the making of the map had nothing to do with his official duties. But he said also, on cross-examination, that he went 'to make a survey of the facilities that were there under the Department of the Interior.' And Mr. Wills, a disinterested witness, testified that the map was prepared in response to an order from Mr. Sawyer in connection with his work in Alaska and to accompany a report to the Secretary of the Interior. He testified further that Mr. Sawyer told him what he wanted the map for, namely, 'in connection with his work in Alaska to point out the availability of Fairbanks, Alaska, as a logical site for the location of radio stations and aviation fields and for use in connection with his report to the Secretary of the Interior.' Mr. Sawyer was Mr. Wills' superior in authority in the Department of the Interior and their conversation took place in the Department during the usual office hours. These circumstances as well as the manner in which the map was prepared and the fact that Mr. Sawyer paid nothing to Mr. Wills for his work upon it, tend strongly to support an inference that

> when Mr. Sawyer ordered the map he regarded its preparation as part of his official duties. * * *" (142 F. 2d at 498).

Both these cases, *Sherrill* v. *Grieves, supra* and *Sawyer* v. *Crowell,* are sound. In reaching opposite conclusions on their particular fact situations they highlight the difference between a government official's right to own his literary output and not to own it.

The third and most recent case on the subject is *First Trust Co. of St. Paul* v. *Minnesota Historical Society,* 251 F. 2d 686, (8 Cir.), affirming a decision of Judge Nordbye, 146 F. Supp. 652 (D.C. Minn.). Involved was title to the original notes of Captain William Clark of the Lewis and Clark Expedition which were found in a St. Paul attic many years after they were written. The United States intervened in the action to quiet title asserting that the notes were the written records of a government officer executed in the discharge of his official duties and were, therefore, public documents owned by the United States. The data and reports requested of the Expedition by President Jefferson had been prepared and delivered and Judge Nordbye found that the writings in question,—rough notes kept by Captain Clark of his own volition and possibly for private publication,—were private property and did not belong to the Government. The Court of Appeals for the Eighth Circuit adopted the findings of the trial court and affirmed the decision saying

> "* * * the character of the documents themselves, viewed in light of the fact that Captain Lewis, head of the Expedition, was making an official record, lend credence to the trial court's view that they were private as opposed to official records." (251 F. 2d at 691).

None of the foregoing cases reached the Supreme Court but their fundamental approach to the rights of individuals in the employ of the Government is consistent with *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, in which inventors employed by the Bureau of Standards were held to be the owners of their inventions and able to make valid assignments of their patent rights even though they had made fairly substantial use of government facilities.

Judged by the standards of these cases, the writing and delivery of the speeches not having been pursuant to orders or a part of the Admiral's official duties, the speeches on creation belonged to him and not to the government.

2. That the Admiral's speeches drew on his experience in the Navy and were in the best interests of the United States and the Navy did not deprive him of his rights in his material.

The Wash[illegible]n publisher argues that any writing related to or [illegible]ected with official duties is within the scope of offic[illegible]uty and is a Government publication not subject to private copyright. This is error.

Writings which "relate to" or are "connected with" the subject matter of one's employment are not necessarily created "in the course of" performing the duties of the employment relationship. This is especially true in the more intellectual areas where individuals, employed regularly but not employed to write, author countless books, monographs and research papers for their own satisfaction, advancement in their professions and as contributions to knowledge in their fields. As Judge Holtzoff pointed out,

> "* * * Many scientific articles published in technical journals are written by scientists employed

> by private concerns and their employers generally encourage such activities. * * *" (R. 42)

It was said in *Sherrill* v. *Grieves*, 57 Wash. L. Rep. 286, 290, quoted at greater length *supra*, p. 31, that

> "* * * The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him."

The Washington publisher relies upon cases involving the acts of federal officials done, as a matter of discretion, pursuant to the performance of their official duties to sustain its views, e.g., *Barr* v. *Matteo*, 360 U.S. 564; *Spalding* v. *Vilas*, 161 U.S. 483; and *United States* v. *MacDaniel*, 7 Peters 1. In these cases the officials were purporting to act in the line of duty and on behalf of the Government. The basic question was whether the individuals could maintain successfully that their acts were done within the scope of their official duties in order to secure various benefits,—immunity in *Barr* v. *Matteo* and *Spalding* v. *Vilas* and reimbursement in *United States* v. *MacDaniel*.

United States v. *Birdsall*, 233 U.S. 223, also improperly relied on by the Washington publisher to sustain the same contention, involved the bribery of Indian Agents in the Department of Interior, whose defense, that the act they promised to perform was outside their official duties, was rejected.

The foregoing cases do not support the proposition that performance of an act which relates in some way to the subject matter of one's employment thereby is

an act done in the course of, or as part of, or pursuant to, the employment. The true tests are what are the understood limits of the employment, the intent of the employee and the nature, time and place of the employee's conduct. The understanding of the employer as to the nature of the employment in this case is shown in Exhibit 24. (R. 27, 111).

B. The incidental use of some Government stationery and secretarial services did not convert private literary material into Government property.

The trial court, after a review of the circumstances under which the speeches were written, held that

> "* * * title to literary property cannot be made to depend on such minor considerations, whether any part of the work was done during office hours, whether a Government secretary participated in getting the manuscript ready, or whether a Government mimeograph or multigraph machine was used in preparing copies. If any Government agency objects to such a course, the matter can be dealt with by regulations or other intramural action, but no such circumstances can deprive the officer or employee of title to property which otherwise belongs to him. * * *" (R. 41)

The Court of Appeals, after reviewing the agreed statement of facts and the findings of the trial court and observing that the writing of these speeches was done at home after normal working hours or while traveling but that the typing of a final copy and the preparation of a multilith master were done by the Admiral's secretary and that the speeches were multilithed on Government duplicating machines as set forth in the agreed facts (R. 49-50), said

> "It would not seem to us that occasional use of a governmental secretary for transcribing or of

multilithing machines for copies for publicizing the speeches would fall under the statutory concept of a publication by or at the cost of the United States." (R. 55, footnote 20)

With respect to the assertion by the Washington publisher that as the speeches "resulted from his official responsibilities" they should be classified as a "publication of the United States Government" under Section 8 of the Copyright Act the Court of Appeals said (R. 53-54)

> "* * * This generalization creates a sea of troublesome questions. Such publications range from the Presidents' messages on the State of the Union, the Congressional Record, departmental pamphlets, maps, regulations, and judicial decisions to forms for the moving of admission to the bars of the various courts. * * * No clarification of the meaning of 'publication of the United States Government' appears in the Rules and Regulations of the Copyright Office.[16] * * *
>
> "The language of the original statute on printing—'No . . . Government publication shall be copyrighted'—seems to refer to a publication actually produced by the Public Printer.[18] * * * The Copyright provision should be read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. * * * "

"[16] 37 C.F.R. § 201.1-201.8 (1960).

"[18] See S. Rep. No. 1473, 56th Cong., 1st Sess."

The mere mechanics by which the speeches were processed should have no bearing on the rights in the material itself. As Chief Justice McCoy said in *Sherrill* v. *Grieves*, 57 Wash. L. Rep. 286 at 290-291:

"* * * if the printing of the plaintiff's pamphlet was improper it does not follow that the pamphlet became a government document except in the mere physical sense. * * *"

1. The preparation of some copies in clear and final form was necessary to comply with a Department of Defense Directive and a Navy Department Regulation.

The Department of Defense Directive No. 5230.9, dated August 17, 1957 (Ex. 13, R. 25, R. 99-102), in its Section I prescribes guidelines for the clearance of official speeches, press releases, photographic material and other information originated within the Department of Defense and "a uniform policy and procedure for the review of manuscripts concerning military matters prepared by military personnel and civilian employees, as individuals for publication" (R. 100). Its Section V deals with "Writing for Publication by Defense Personnel, as Individuals" (R. 102) and provides that personnel who write for outside publication not in connection with their official duties shall ascertain that such activity will not interfere with their regularly assigned duties, that such activity shall not be conducted during normal working hours or accomplished with the use of Department of Defense facilities or personnel, that such writers will be on exact parity with outside professional writers with respect to accessibility and use of technical or other information and that "Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security." (R. 102).

The Admiral did comply with the requirements that the material be submitted to the Office of Security Re-

view. Each of the speeches bears a stamp reading "No objection to publication on grounds of military security." (R. 27).

In order to make the required submission to the Office of Security Review and also to comply with the requirement of Paragraph 3 of Navy General Regulation 1252 (Ex. 14, R. 25, 103-4), namely that persons in the naval service whose articles expressing their private opinions on "professional, political or international subjects" are to be published shall forward a complete copy to the Secretary of the Navy for the files of the Navy Department, it was essential that the speeches be multilithed. Therefore, it was no breach of propriety for the Admiral to have used his secretary to prepare the final draft of his speeches, to prepare the multilith masters and to ask to have the speeches run off on the Department's multilith machines. The running of additional copies for distribution by the Admiral to those interested in his subject is a very slight and technical encroachment on the letter of the Department of Defense Directive and the Navy Regulations. The courts below have properly characterized the use of services and facilities as a minor consideration (R. 41) not bringing the speeches under "the statutory concept of a publication by or at the cost of the United States." (R. 55, footnote 20).

2. The form of the press releases and the lack of an express disclaimer of the official nature of the opinions stated in the early speeches did not deprive the Admiral of ownership of the speeches.

The Department of Defense Directive (Ex. 13, R. 99-102) does not provide for disclaimer of official status. However, the Navy Department Regulation, § 1252, ¶ 3, provides that writers of articles published on "professional, political or international subjects

* * * shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large." Such a disclaimer was not used in the early speeches. On each of his speeches since this action was commenced, the Admiral has placed a notice of disclaimer.

This question of the use of a disclaimer, like the question presented by the use of stationery bearing the name of the Atomic Energy Commission or the Navy Department or the Department of Defense, with or without one of the various seals imprinted on the paper as part of the letterhead, is not one of substance.

The appearance of the copies of the speeches might be of some significance if a user of a copy of a speech were thereby misled by the appearance of the speech into a change of position to his detriment or if the Admiral were suing such a user for having taken some of the material. In such a case the user might well argue that his use had been made under the impression that the material was a Government publication. This is not the case here. The Washington publisher who brought this declaratory judgment action asked the Admiral for permission to use the speeches. The Washington publisher did not assume that they were Government publications; he merely argues that they ought to be Government publications.

At most what is involved is failure to observe a departmental regulation and as Judge Holtzoff said (R. 41):

> "* * * If any Government agency objects to such a course, the matter can be dealt with by regulations

> or other intramural action, but no such circumstances can deprive the officer or employee of title to property which otherwise belongs to him. * * * "

The Government asserts no rights in the speeches as it did in *First Trust Co. of St. Paul* v. *Minnesota Historical Society*, 251 F.2d 686 (8 Cir.). This lack of interest was not due to lack of knowledge of the existence of the controversy. Significance was attached to this by the trial court which said:

> "* * * In this instance, although the Court caused the United States Attorney to be notified of the pendency of this proceeding, and extended an opportunity to Government counsel to appear as *amicus curiae*, the Government did not avail itself of this invitation. Manifestly, it is a fair inference that the Government does not feel that it has any interest in the proceedings and that it does not desire to assert any paramount title, or to claim that the literary product here involved is in the public domain." (R. 41)

The stationery and the seal are mere externals which do not go to the substance of the ownership of the literary material embodied in the speeches.

The important thing is that the Admiral's speeches are not listed in the United States Government Publications Monthly Catalog from 1955 to date.

IV. SOUND PUBLIC POLICY REQUIRES THAT FREEDOM OF EXPRESSION BY GOVERNMENT OFFICIALS BE ENCOURAGED

It is not in the public interest to hamper intellectual growth or to interfere with the development of ideas. If by entering government employment individuals were to sell all their energies, physical and mental, and commit themselves to deliver all their writings to the government insofar as they related in any way to sub-

ject matter dealt with by them in performing their duties, a faceless and anonymous group of conformists would be bred, deprived in substantial part of individual character, freedom and incentive. The total output of new thought would be reduced and each thinker would be at the mercy of his superiors in rank with respect to the circulation and publication of his writings.

As long as security is not violated, as long as illegal conduct such as interfering with elections is avoided, to permit individual thoughts and recommendations to be expressed is far better than to run the risk of bottling them up under a system of administrative review.

A. Departmental directives and regulations recognize that military personnel and civilian employees may write as individuals.

It is the policy of the Department of Defense and the Department of the Navy to encourage personnel, both military and civilian, to write for outside publication. Department of Defense Directive No. 5230.9, dated August 17, 1957, titled "Clearance of Department of Defense Public Information" (Ex. 13, R. 25, 99-103), provides, in Paragraph V, as follows:

> "V. WRITING FOR PUBLICATION BY DEFENSE PERSONNEL, AS INDIVIDUALS
>
> Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers

> with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security."

This permits outside writings on any subject without regard to whether the subject "relates to" or is "connected with" the writer's work as long as the writing is not in connection with official duties. The permission is subject only to the normal restriction that the writing activity will not interfere with regularly assigned duties or violate military security and that the Defense personnel shall be on no better basis than outside professional writers as concerns access to information.

This policy of encouragement is also formally expressed in the Navy General Regulations, Section 1252.3 (Ex. 14, R. 25, 103-4) which permits persons in the naval service to publish articles on "professional, political, or international subjects". Paragraph 5 of the same Regulation (Ex. 14, R. 104) provides that: "Subject to the requirements and restrictions of this article, persons in the naval service are at liberty to publish articles without further permission from higher authority."

The only "requirements and restrictions" to be found in the article (Ex. 14) are that the writer's signature appear, together with a statement that the opinions or assertions contained in the writing are the private ones of the writer, and that upon acceptance of an article for publication, complete copies shall be forwarded to the Secretary of the Navy for the Department's files.

Far from indicating that such writings may not relate to the writer's duties, the regulation expressly provides for the writing of articles on "professional" subjects which must be deemed to include the writer's own profession.

Similarly, the policy to encourage writing is formally expressed in Article 0514 of the U. S. Navy Public Information Manual (Navexos P-1035). This article is titled "Writing for Publication" and in part reads as follows:

> "1. General Policy.
>
> "(a) Within the bounds of security and Department of the Navy policy, the writing of articles, books, scripts, speeches and similar material intended for publication on topics of military and professional interest, or general interest concerning the Navy, or in support of the military policy of the United States, or in the interest of the national defense is desirable and so authorized. * * * ".

The writings here in question are quite in accord with the policy of the military establishment to encourage the writing for publication of even those articles which "relate to" or are "connected with" the official duties of the author. It is clear that when a person in the military does so, not pursuant to direction, such writings are not considered by the Navy Department to be a part of "official duties" and hence are not government publications. (Ex. 24, R. 27, 111).

In the field of atomic reactors there has been a substantial distribution of information and this is known to the Washington publisher. In *Constraint by Copyright*, by M. B. Schnapper, copyrighted by Public

Affairs Press, Washington, D. C., 1960, are listed, on pages 58, 60, 63 and 64, a number of books published between 1952 and 1959 on nuclear power reactor design, research, development and related problems. The nature and size of this list indicate that the information on the subject was made widely available in organized and authoritative form. Although much of this material was copyrighted the information and ideas embodied in it were, and now are, available and usable.

The only possible objection to this type of dissemination of information is that raised by a publisher who merely wants to copy free of charge, and to sell for whatever the traffic will bear, material produced by others.

B. The Admiral's writings have added to the sum of human knowledge.

The Admiral's speeches had a profound effect on public thinking in the field of education. The first eleven of them antedated Sputnik. If the Admiral had not stirred himself and made the speeches, the public and the press would have had that much less to talk about. Far from restraining the circulation of information the speeches promoted it.

None of the speeches revealed classified information and the data incorporated in certain of the speeches were freely available in book and other form. It is well known that the Admiral has taken the initiative over the years in having the problems and the progress of the atomic reactor programs published.

In the course of hearings before subcommittees of the Joint Committee on Atomic Energy, "Naval Reactor Program and Shippingport Project", 85th Congress, 1st Session, March 7 and April 12, 1957, released

in June 1957, the Admiral furnished for the record (pp. 45-51) a list of the information on new techniques, materials and equipment development which had already been released to the public as unclassified for the use of American industry and the public. These items included a number of handbooks and manuals, some of which are dated as early as June 1950.

In *Liquid Metals Handbook, 1 June 1950*, published by the Government Printing Office, among the acknowledgments is the following, (p. v):

> "Captain H. G. Rickover, USN, of the AEC, who made the original suggestion of this handbook to the committee has lent support and encouragement to the handbook project throughout its development. * * *"

In the report of hearings before the Joint Committee on Atomic Energy, 86th Congress, 1st Session, April 11 and 15, 1959, there is incorporated as Appendix 2 (pp. 59-71) a comprehensive early history of the pressurized water reactor (PWR) at Shippingport. Also attached as Appendix 3 (pp. 71-81 with particular reference to the technical papers and books listed on pp. 79-81) is a summary of technical benefits derived from the naval reactor and Shippingport programs. These hearings were held a month before the Admiral's Shippingport speech of May 28, 1959 (Ex. 12, R. 20, 98-9).

In addition, there have been on the bookshelves for some time the following with respect to Shippingport:

> The "Shippingport Pressurized Water Reactor" written by personnel of Naval Reactors Branch, United States Atomic Energy Commission and Westinghouse and Duquesne Light and Power, 1958, published by Addison-Wesley Publishing Company, September 1958.

Bettis Technical Review, April 1959, "One Year of Operating Experience at Shippingport"—Westinghouse (WAPD-BT-12), available at the Office of Technical Services, Department of Commerce, Washington 25, D. C.

1. The press was specifically authorized to use the material but even if there had been no invitation the press could have used the speeches as news.

Each of the first three speeches of the Admiral's to bear a copyright notice, namely those of December 11, 1958 (Ex. 9), February 17, 1959 (Ex. 10) and March 16, 1959 (Ex. 11), bore beneath the notice a legend as follows:

> "No permission needed for contemporaneous press use."

In subsequent speeches this legend was made more specific by referring to "newspaper and news periodical use" instead of "press use" and the word "contemporaneous" was omitted in order to avoid giving the impression that there was some time limit on such use. This change was effected as a result of a suggestion from a member of the journalistic fraternity, Ex. 7, and is elaborated upon in Ex. 8 (Ex. 7, R. 91-2; Ex. 8, R. 93-4). The nature of the press release itself and the legend in either form clearly indicate the Admiral's intention to have the material used to the extent deemed desirable by any newspaper or news periodical. However, theoretically such permission might be withdrawn. In that event the press could still have made use of any of the speeches, whether copyrighted under the statute or not, quite apart from the general doctrine of "fair use" because the "news" element, the information concerning current events contained in a literary production, is not the subject of copyright. *International News Service* v. *Associated Press*, 248

U.S. 215; *Chicago Record-Herald Co.* v. *Tribune Association*, 275 Fed. 797 (7 Cir.); *Morse* v. *Fields*, 127 F. Supp. 63 (S.D.N.Y.); *Davis* v. *Bowes*, 209 Fed. 53 (S.D.N.Y.). Insofar as the restraint of new information is concerned, if what was contained in the Admiral's speech was not new, no harm is done and if it were new, it would be "news" and the press would be able to copy it without question under the line of cases just cited.

2. Any writer or publisher is free to use the speeches fairly under the copyright doctrine of "fair use".

Even writers and publishers not in the newspaper business would be entitled, under the doctrine of fair use as it has been established in copyright law, to quote portions of the speeches. Whether a use is fair or not depends upon all of the circumstances surrounding the use. *Benny* v. *Loew's, Incorporated*, 239 F. 2d 532 (9 Cir.), affirmed, 356 U.S. 43.

The extent and relative value of the copyrighted material taken, the purpose for which it is taken and the effect of the distribution on the owner of the original work must all be taken into consideration. The subject has been well summarized by Judge Yankwich in *What is Fair Use?*, 22 U. of Chi. L. Rev. 201 (1954):

> "If the amount reproduced is legitimately necessary to review the book, or is a part of a scientific or other exposition of the subject, in which the theories expounded by others must be discussed, the use, regardless of quantity, is fair. If, on the other hand, the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair." (208, 9)

Judge Story said in *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4,901,

> "* * * no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. * * *" (344).

The ideas which are embodied in a copyrighted work as distinguished from the form of expression itself are not subject to copyright and therefore the information, as distinguished from the form in which the information is expressed by the original writer, may be circulated. *American Visuals Corp.* v. *Holland*, 219 F.2d 223 (2 Cir.); *Funkhouser* v. *Loew's, Inc.*, 208 F.2d 185 (8 Cir.). There is, therefore, nothing in copyright which tends to bottle up information and ideas. The only barrier is that to slothful or mechanical copying without permission. This is particularly true when, as here, the claimant to the right to copy wishes to enrich himself by the free use of the material produced by another.

Far from restricting the flow of information, the Admiral, by writing and delivering his speeches, has contributed to it. There is unavoidably presented the question of balancing the equities and this is summed up completely by Judge Washington in his dissent (R. 64) with respect to the question of dedication of the early speeches:

> "The plaintiff-appellant comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the (fol. 67) speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. This is a litigation which in its every aspect deserves to fail."

C. The Admiral's rights of ownership in his speeches are consistent with the constitutional rights of freedom of speech and freedom of the press.

The Admiral's rights of ownership of his copyrights, like the guarantee of freedom of speech and freedom of the press, have their origin in the Constitution. The purpose behind Clause 8 of Article I, Section 8 of the Constitution, which empowers Congress to grant patents and copyrights, is to encourage individual effort in order to advance the public welfare through the maximum use of the talents of authors and inventors in science and the useful arts. *Mazer* v. *Stein*, 347 U.S. 201. The power to prescribe the conditions on which an author shall enjoy exclusive rights in his writings has been exercised by Congress in the enactment of the Copyright Law. *Wheaton* v. *Peters*, 8 Peters 591.

The Washington publisher contends that unless Admiral Rickover's speeches are cast into the public domain, its constitutional rights are violated because of the First Amendment's provision that Congress shall make no law abridging freedom of the press. This must mean that if Admiral Rickover's speeches are not government publications and are therefore subject to the protection of the Copyright Act the Copyright Act is unconstitutional, an absurdity in view of Article I, Section 8, Clause 8 of the Constitution.

In crying Freedom of the Press the Washington publisher has raised a straw man. The object of the First Amendment is to prevent restraint by the Government, in whatever form that might take, on the free and general discussion of public matters. *Grosjean* v. *American Press Company*, 297 U.S. 233; *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697. This case cannot even remotely be said to raise a question of "restraint" within the meaning of the First Amendment. There is no attempt here by the government to muzzle the Wash-

ington publisher in the free exercise of a right to criticize, comment, or discuss, or to print anything it desires to print. It is a question of the ownership rights of a particular author in his literary creations, and nothing more, which is at issue here. It is this question of *ownership* which would have to be answered in favor of the Washington publisher before there could possibly arise any question of freedom of the press.

The Washington publisher maintains that it is a "trustee" of "the people's right to know" and as such it is entitled to an untrammeled "freedom of access" to acquire materials it may desire to publish. This is equivalent to insisting that it obtain its source material free of charge,—that it is entitled to pirate Admiral Rickover's speeches. The First Amendment does not confer upon publishers, whether they be book publishers or newspaper publishers, any constitutional right of access to information not available to others. *Tribune Review Publishing Company* v. *Thomas*, 254 F. 2d 883 (3 Cir.); *Trimble* v. *Johnston*, 173 F. Supp. 651 (D.C. D.C.); *United Press Association* v. *Valente*, 308 N.Y. 71, 123 N.E. 2d 777; *New York Post Corporation* v. *Moses*, 23 Misc. 2d 826, 204 N.Y.S. 2d 44.

In the *Tribune Review* case, the court, rejecting the same false issue sought to be raised here, observed that the case did not deal with freedom of expression at all but had to do simply with gaining access to information on matters of public interest, the taking of photographs in a court room:

> "* * * this question of getting at what one wants to know, whether to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the First and Fourteenth Amendments of the Constitution. * * *" 254 F. 2d at 885.

In *Mabee* v. *White Plains Publishing Co., Inc.*, 327 U.S. 178, this Court answered a contention that the Fair Labor Standards Act of 1938, 52 Stat. 1069, "lays a direct burden on the press in violation of the First Amendment" by saying, "As the press has business aspects it has no special immunity from laws applicable to business in general." 327 U.S. at 184, citing *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103.

The First Amendment and a federal copyright statute have existed side by side for almost one hundred seventy years without a hint of conflict being raised between the two on constitutional grounds.

Professor Chafee, in *Free Speech in the United States*, (4th Ptg., 1948), pp. 572-4, listed nineteen federal statutes affecting freedom of speech. The Copyright Act is not among them.

The issue of "freedom of the press" has no relevance to this case and the Washington publisher's rights to material it desires to publish are no greater in the premises simply because it happens to have access to printing presses. Its plea is not for a "free press" but for free material for its presses.

V. THE FINDINGS OF FACT SHOULD NOT BE DISTURBED.

Factual findings concurred in by two lower courts will usually be accepted by the Court unless clear error is shown. However, on some occasions the Court finds it necessary to consider the facts to determine for itself whether the proper legal tests have been applied by the lower courts to the facts. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377.

In *Graver Tank & Manufacturing Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, on rehearing, 339 U.S. 605 this Court said (336 U.S. at 275):

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. * * *"

In the instant case the unanimous findings of fact as to the non-governmental nature of the Admiral's speeches should be followed because they are so precise and definite and so clearly not erroneous.

CONCLUSION

It is respectfully requested that this Court:

(a) affirm the unanimous decision of the Court of Appeals that the speeches as they were created belonged to the Admiral and not to the Government, and

(b) reverse the decision of the Court of Appeals that the speeches distributed without notice of copyright were dedicated to the public domain.

Respectfully submitted,

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September 15, 1961

APPENDIX

APPENDIX A

United States Court of Appeals
For the
District of Columbia Circuit
FILED Jan. 17, 1961
/s/ JOSEPH W. STEWART
Clerk

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

District Court Civil Action No. 116-59

No. 15,463

PUBLIC AFFAIRS ASSOCIATES, INC., *Appellant*,

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Appellee*.

Before: Mr. Justice Reed, sitting by designation, and Washington and Danaher, Circuit Judges, in Chambers.

Order

Upon consideration of appellee's motion to recall and modify the judgment entered herein October 20, 1960, and of appellant's opposition, it is

ORDERED by the court that the judgment of October 20, 1960, shall be recalled from the District Court and amended by substituting in place of the last paragraph of the order the following:

"It is FURTHER ORDERED by the court that each party shall bear its own costs on this appeal."

It is FURTHER ORDERED by the court that the judgment, as modified, shall be forthwith transmitted to the District Court.

Per Curiam.

Dated: January 17, 1961

APPENDIX B

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States,
Article I, Section 8, Clause 8.

The Congress shall have Power * * *;

* * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * *

Amendment [I]

Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

Copyright Act of 1790
§ 1 and § 6, c. 15, 1 Stat. 124

SECTION 1. * * * That from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, * * * and any other person or persons, being a citizen or citizens of these United States, or residents therein, * * * who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office, as is herein after directed: * * * And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors,

administrators or assigns, for the further term of fourteen years: * * *

SEC. 6. *And be it further enacted*, That any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.

17 U.S.C. § 2. Rights of author or proprietor of unpublished work

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material

No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: *Provided*, That copyright may be secured by the Postmaster General on behalf of the United States in the whole or any part of the publications authorized by section 1 of the Act of January 27, 1938 (39 U.S.C. 371).

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor. July 30, 1947, ch. 391, § 1, 61 Stat. 652; Oct. 31, 1951, c. 655, § 16(b), 65 Stat. 716.

17 U. S. C. § 10. Publication of work with notice

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 12. Works not reproduced for sale

Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; * * * But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale. July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 13. Deposit of copies after publication; action or proceeding for infringement

After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of

Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, * * * As amended, Mar. 29, 1956, c. 109, 70 Stat. 63.

17 U.S.C. § 24. Duration; renewal and extension

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, * * * July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 26. Terms defined

In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire. July 30, 1947, c. 391, § 1, 61 Stat. 652.

44 U.S.C. § 58. (Printing Law of 1895, § 52)
Sale of duplicate plates; copyright

* * * No publication reprinted from such stereotype or electrotype plates [from which any Government publication is printed] and no other Government publication shall be copyrighted. (Jan. 12, 1895, c. 23, § 52, 28 Stat. 608.)

Navy Department General Regulations,
Article 1252, Par. 3

3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for pub-

lication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department.

37 C.F.R. § 202.6 Lectures or similar productions prepared for oral delivery (Class C)

This class includes the scripts of unpublished works prepared in the first instance for oral delivery, such as lectures, sermons, addresses, monologs, panel discussions, and variety programs prepared for radio or television. The script submitted for registration in Class C should consist of the actual text of the work to be presented orally. Formats, outlines, brochures, synopses, or general descriptions of radio and television programs are not registrable in unpublished form. When published with notice as prescribed by law, such works may be considered for registration as "books" in Class A.

ADMINISTRATIVE ORDERS

Department of Defense Directive No. 5230.9, August 17, 1957

I. PURPOSE

This directive prescribes guidelines for the clearance of official speeches, press releases, photographic material and other information originated within the Department of Defense or any of its agencies for public release. It also prescribes a uniform policy and procedure for the review of manuscripts concerning military matters prepared by military personnel and civilian employees, as individuals for publication.

V. WRITING FOR PUBLICATION BY DEFENSE PERSONNEL, AS INDIVIDUALS

Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall

ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security.

U. S. NAVY PUBLIC INFORMATION MANUAL.
Navexos P-1035. Article 0514.
Writing for Publication

1. General Policy.

(*a*) Within the bounds of security and Department of the Navy policy, the writing of articles, books, scripts, speeches and similar material intended for publication on topics of military and professional interest, or general interest concerning the Navy, or in support of the military policy of the United States, or in the interest of the national defense is desirable and so authorized.

(*b*) Commanders will provide full cooperation, compatible with military security, to persons requesting information and/or assistance in the preparation of material for publication as specified in article 0514.1 (*a*), above.

(*c*) Military personnel and civilian employees of the Naval Establishment are authorized to write for publication subject to provisions of this section and provided that:

(1) Such activity does not interfere or conflict in any way with regularly assigned duties.

(2) Such activities [sic] not conducted during normal duty hours.

(*d*) Commanders should encourage military personnel and civilian employees to write for publication. However, personnel engaged in writing for publication for personal profit are on an exact parity with civilian professional writers not in the employ of the Navy as far as accessibility to classified current technical or operational military information is concerned. This policy applies to military personnel on active duty, retired persons, and members of the civilian components.

(*e*) Military and civilian personnel may receive pay for private literary effort; however, they may not receive pay or other remuneration for the preparation of material which their duties require them to provide gratuitously. This policy applies to any official Navy material, including photographs, authorized for public release.

(*f*) The inclusion of classified information in any article, book or related material prepared for public dissemination by military or civilian members of the Naval Establishment is prohibited. The policy of security at the source applies and in all cases the final responsibility for material intended for publication rests upon the individual preparing and/or releasing such material.

(*g*) As provided by Navy Regulations, article 1252.3—"Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signature to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department."

(h) Articles dealing with military matters, written by personnel on active duty or employed in the Naval Establishment, will be submitted to the Office of Information for review and clearance to avoid any possible violation of military security.

(i) Subject to the requirements above, persons in the Naval Establishment are at liberty to publish articles for personal profit without further permission from higher authority.